

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
August 26, 2009 Session

STATE OF TENNESSEE v. RICHARD BEHELER

**Appeal from the Circuit Court for McMinn County
No. 06-478 Carroll Ross, Judge**

No. E2009-00120-CCA-R9-CD - Filed January 25, 2010

The Defendant, Richard Beheler, appeals by permission from the judgment of the Circuit Court of McMinn County. Following a jury conviction of aggravated sexual battery for which he received a sentence of nine years to be served at one hundred percent, the trial court granted the Defendant's motion for new trial based upon its finding that trial counsel committed ineffective assistance. The Defendant then filed a motion to compel the State to reinstate its original plea offer of sexual battery by an authority figure with a four year sentence to be served as a Range I, standard offender. The trial court denied the motion based upon its finding that the Defendant failed to establish a reasonable probability that he would have accepted the original plea offer had it been properly communicated to him. The trial court granted the Defendant's application for interlocutory appeal of this issue. Tenn. R. App. R. 9. In this appeal by permission, the Defendant contends that the original plea offer should be reinstated. Following our review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 9 Appeal by Permission; Judgment of the Circuit Court
is Affirmed.**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and CAMILLE R. MCMULLEN, J., joined.

Robert R. Kurtz, Knoxville, Tennessee, attorney for appellant, Richard Beheler.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; R. Steven Bebb, District Attorney General; and Andrew Freiburg, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

The record reflects that the Defendant was convicted of the aggravated sexual battery of his four-year-old daughter. The testimony at trial consisted of the victim's mother (also the Defendant's ex-wife) who stated that she learned of the sexual abuse on July 10, 2006, when her mother and sister told her that the victim reported to them that the victim "had licked her daddy's parts" while watching a "nasty movie" with the Defendant. When the victim's mother asked the victim about the incident, the victim became "hysterical because she said her daddy said not to tell nobody." The victim's mother testified that she confronted the Defendant about the report and that he denied it, claiming that the victim had imagined it. She then reported the incident to the Department of Children's Services (DCS). She testified that after denying the incident twice, the Defendant eventually told her "some crazy, stupid story" that he had crawled behind the television to hook up the VCR when a pornographic movie came on the television without his knowledge and in the victim's presence. The victim's mother testified that the victim told her that the Defendant did not touch her and that the victim had not seen the Defendant since the incident.

The victim, who was five-years-old at the time of trial, testified that the Defendant "made [her] lick his parts" the last time she saw him. Through the use of a diagram, the victim indicated that the Defendant made her lick his penis. She testified that the incident lasted ten minutes while a movie depicting oral sex was on television. On cross-examination, the victim denied that she had an earache on the day of the incident and she also denied watching "The Wizard of Oz" that day with the Defendant.

McMinn County Sheriff's Department Detective Mike Hayes testified that he attended the interview between the victim and DCS case worker, Julie Allen. After interviewing the victim, Detective Hayes interviewed the Defendant. During this initial interview, the Defendant denied any contact between himself and the victim. He explained that a pornographic movie was accidentally left in the DVD player and while he was hooking up the VCR for the victim, the movie played silently without his knowledge. The Defendant told Detective Hayes that as soon as he realized the video was playing, he turned it off. The Defendant told Detective Hayes that the victim was playing on the floor and that he did not think she had seen the video so he did not talk to her about it.

Detective Hayes testified that the victim "gave a good interview and [said] stuff that she shouldn't be saying, for a four-year-old" and that the Defendant's statement "just did not add up." He stated that the Defendant was interviewed a second time. During the second statement, the Defendant stated that he had been wearing loose shorts the day the victim was at his house. He told Detective Hayes that the victim put her head on his lap so that he could give her some eardrops for an earache. He then told Detective Hayes:

While her head was in my lap, she pulled my shorts back, and I can't remember if she touched it with her hand or not, but she did lick my penis. It didn't last long. It freaked me out. I couldn't believe she did it.

Detective Hayes described the Defendant as uptight during the first interview but stated that he "just kind of mellowed out" after giving the second statement. On cross-examination, defense counsel asked if the Defendant had taken a polygraph test at any time during the investigation and the trial court permitted Detective Hayes to respond that one had been administered. On redirect, he testified that the second statement occurred after the polygraph test.

The Defendant testified that while attempting to install the VCR, he accidentally played part of a pornographic DVD. He stated that he unplugged the DVD player as soon as he realized what happened and that the victim seemed not to notice the video and continued playing on the floor. Later, as they watched "The Wizard of Oz," the Defendant gave the victim some eardrops for her earache. He testified that she sat with her head on his lap for some time and suddenly sat up, pulled back his shorts and licked his penis. The Defendant testified that he asked her why she would do that and she told him that she thought he would like it. The Defendant testified that he told the victim not to do it again. The Defendant explained that he lied in his initial statement because he did not want to lose the trust of his ex-wife whom he perceived did not trust him to care for the victim. On cross-examination, the Defendant testified that he believed the victim was coerced into telling investigators that he forced her to participate, but that in many other respects, their accounts of the incident are alike. He stated that her initial statement to DCS did not include any reference to him forcing her to do anything. At the close of proof, both parties stipulated to the admission of the videotaped statement of the victim.

Based upon this evidence, the jury convicted the Defendant of aggravated sexual battery. At the August 6, 2007 sentencing hearing, the trial court imposed a sentence of nine years to be served at one hundred percent in the Department of Correction.

On September 5, 2007, the Defendant filed a motion for new trial alleging insufficient evidence, excessive sentence, and ineffective assistance of counsel. At the motion for new trial hearing, trial counsel testified that he was retained to represent the Defendant and that, although licensed since 1963, he had little experience representing individuals in criminal cases. He stated that the Defendant's case was his first felony trial. He said that he made no attempts to interview the victim or her mother prior to trial. Likewise, he could not recall specifically interviewing Detective Hayes. He also did not interview Julie Allen, the DCS caseworker. Trial counsel admitted that he filed no pretrial motions in the case.

Regarding the plea negotiations, trial counsel was equivocal regarding when he learned and informed the Defendant that a conviction for aggravated sexual battery required service of one hundred percent of the sentence. While admitting that he did not initially know the details of release eligibility of an aggravated sexual battery conviction, he could not recall whether he learned of the one hundred percent service before or after trial. He admitted that he “wasn’t sure about” community supervision for life requirements at the time of the plea negotiations. Trial counsel identified a copy of the original plea offer which allowed the Defendant to plead to the reduced charge of sexual battery by an authority figure with an agreed sentence of four years at thirty percent. He testified that he understood the sentence to mean that the Defendant would serve about fourteen months before his release; he was not aware that TDOC routinely denied parole for sexual offenses.

Regarding his performance at the trial, trial counsel testified that he presented a defense that the Defendant did not intend for the touching to occur and that “[t]he child had . . . done it before he could get control of the situation.” Trial counsel admitted that he did not object to any hearsay testimony presented through the victim’s mother, but he stated that even with only the victim’s testimony, the State had a strong case. Trial counsel testified that he understood that evidence of the polygraph test was inadmissible but that he only asked Detective Hayes about the polygraph test “to find out if it was done.” At the time of his testimony at the motion for new trial hearing, he could not recall the result of the testing. Trial counsel testified that, after the presentation of the Defendant’s testimony, he stipulated to the admissibility of the videotaped statement of the victim. He acknowledged at the motion for new trial hearing that the videotape was not “any help to the defense” and that he had failed to impeach the credibility of the victim in any way to require its introduction. Trial counsel testified that he thought the tape was admissible because it was in the State’s file and did not consider that the videotape could be construed as an improper use of a prior consistent statement to support the victim’s unimpeached testimony. Trial counsel testified that he did not prepare the Defendant for cross-examination by the State.

On cross-examination, trial counsel recalled that the assistant district attorney general explained the elements of the plea negotiations to the Defendant, including the release eligibility percentages. He stated that the assistant district attorney specifically explained the one hundred percent service requirement of the aggravated sexual battery conviction during the plea negotiations. Trial counsel also recalled that the Defendant refused the plea offer because he “was adamant” that he would not serve any time for the offense because he claimed it was an accident. Trial counsel also recalled, as reflected by the plea offer form, that the State’s initial offer was for five years and that through some negotiation, the State ultimately offered the plea of four years. Trial counsel stated that the Defendant wanted the videotape of the victim’s statement admitted in order to show that she initially did not claim that the Defendant forced her to perform any acts. Trial counsel recalled that he advised the Defendant to take the plea offer “about two or three times” but that both the Defendant and

his mother were adamant that he refuse the offer and that the Defendant “wanted to get before the jury and explain [the incident] to them.” Trial counsel testified that the Defendant consistently explained his version of the incident, even during plea negotiations, and that he was insistent upon going to trial.

The Defendant testified that he retained trial counsel about one and one-half months after his initial arrest and that he paid trial counsel five hundred dollars to represent him through trial. He testified that trial counsel did not explain the elements of the offense to him and never reviewed any pretrial discovery matters with him. The Defendant initially testified that trial counsel never showed him the indictment, but he admitted upon questioning by the trial court that he had received the indictment at his arraignment prior to his retention of trial counsel. He denied seeing the actual plea offer form but stated that he understood that he would serve fourteen months and “be out.” He claimed not to know that the actual offer was for four years as a Range I, standard offender. He testified that trial counsel failed to inform him that a conviction for aggravated sexual battery required one hundred percent service of the sentence and that he first learned of the one hundred percent service requirement when he met with new counsel after his conviction. He testified that had he known the original plea offer was for four years at thirty percent and that the charged offense included one hundred percent service of the sentence, he would have taken the plea offer. The Defendant testified that trial counsel did nothing to prepare him for trial and that they had no discussions regarding possible defenses or tactics.

On cross-examination, the Defendant denied that the assistant district attorney general explained to him the possible sentence of an aggravated sexual battery conviction. The Defendant admitted that he was informed of the plea offer, that he was aware it was less than he would face if convicted at trial, and that he told trial counsel that he wanted to try the case. He further admitted that he was not forced to testify at trial and that he told the jury that he did not intend for the acts to occur. The Defendant also acknowledged that trial counsel advised him to take the plea offer but he chose to try the case. The Defendant also testified that his mother encouraged him to reject the plea offer.

On March 17, 2008, the trial court granted the motion for new trial based upon its finding that “defense counsel’s ineffective assistance caused the [D]efendant actual prejudice during plea negotiations and the trial.” Following the granting of the motion, the Defendant sought to compel the State to reinstate the original plea offer. The record reflects that the State offered the Defendant a plea to attempted aggravated rape with a nine year sentence to serve at thirty percent. However, the Defendant sought reinstatement of the original plea offer which contemplated a plea to sexual battery by an authority figure with a four year sentence to serve at thirty percent. On October 20, 2008, the trial court denied the Defendant’s motion to compel. The trial court found that the plea offer was adequately conveyed to the Defendant and that the Defendant insisted upon proceeding to trial. The trial

court also found that trial counsel “did not render ineffective assistance of counsel during the plea negotiations” but, even assuming he did, the Defendant failed to show a reasonable probability that he “would have accepted any offer made to him that included serving a sentence . . . [of] imprisonment.” Subsequently, the trial court granted the Defendant’s motion for an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. This court granted the request for interlocutory review; the issue presented in this case is whether the trial court erred in denying the Defendant’s motion to compel reinstatement of the original plea offer.

ANALYSIS

The law is well-settled that a defendant does not have a constitutional right to enter into plea negotiations with the prosecution. See Harris v. State, 875 S.W.2d 662, 666 (Tenn. 1994). However, once plea negotiations are initiated, a defendant is entitled to the effective assistance of counsel throughout plea negotiations. Id. Trial counsel’s complete failure to communicate a plea offer to a defendant constitutes deficient performance and the defendant’s ignorance of a plea offer undermines confidence in the outcome of the prosecution. Id. at 665-66.

Relative to the prejudice prong regarding a claim of ineffective assistance of counsel during plea negotiations, our supreme court has noted that the fair trial standard typically employed for ineffective assistance of counsel analysis is not applicable in the context of plea negotiations. State v. Garrison, 40 S.W.3d 426, 431 (Tenn. 2000). In Garrison, our supreme court enunciated the following standard:

In the context of a [defendant] who seeks to reinstate (rather than withdraw) a plea offer, the [defendant] must show that there is a reasonable probability that he or she would have accepted the plea had it been properly communicated to him or her.

Id. In applying this standard in Garrison, our supreme court held that the defendant was unable to prove prejudice based upon the trial court’s finding that the defendant learned of the plea offer during trial and indicated that he would have rejected the offer had it been presented to him pretrial. Id. at 431-32. Similarly, this court affirmed a trial court’s denial to reinstate a plea offer when the post-conviction court accredited testimony at the evidentiary hearing that trial counsel informed the petitioner of the offer on three or four occasions, but the petitioner insisted that he had done nothing to merit a sentence of the offered length thereby refusing to admit guilt and rejecting the plea offer. Byron M. Edwards v. State, No. E2002, 00343-CCA-R3-PC, 2003 WL 21004761, at *11 (Tenn. Crim. App. May 5, 2003) (“We are unwilling to declare that counsel, to be constitutionally effective,

must pressure a reluctant client into accepting a favorable plea bargain.”), app. denied (Tenn. Oct. 6, 2003).

In this case, the trial court accredited the testimony of trial counsel that the Defendant was informed of the nature of the plea offer and the punishment he faced if convicted of aggravated sexual battery at trial. Contrary to the Defendant’s testimony at the motion for new trial hearing, included in this advice was the explanation by the assistant district attorney general that the aggravated sexual battery sentence required one hundred percent service. The trial court also accredited trial counsel’s testimony that, despite numerous attempts to convince the Defendant to accept the plea offer, the Defendant was “adamant” to go to trial and tell a jury his version of the incident.

Under these circumstances, we conclude that the evidence does not preponderate against the trial court’s finding that the Defendant failed to prove deficient performance. Furthermore, even if we presume deficient performance, we agree with the trial court that the Defendant failed to establish a reasonable probability that he would have accepted the plea offer but for the alleged errors of counsel. Instead, the record reflects that the Defendant insisted upon going to trial so that he could tell a jury his account of the offense. As noted by this court in Walton v. State, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997), “a defendant may make a knowing, yet unwise decision” when faced with the option of accepting a plea offer or proceeding to trial. However, an unwise decision does not merit reinstatement of a plea offer. Therefore, we affirm the judgment of the trial court.

CONCLUSION

In consideration of the foregoing and the record as a whole, the judgment of the trial court denying the Defendant’s motion to compel reinstatement of the plea offer is affirmed. The case is remanded for further necessary proceedings.

D. KELLY THOMAS, JR., JUDGE